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remainder of the term. But for the fact that the lease was a registered document, and that the rent had been paid *bonâ fide* in advance, in accordance with the condition in it, the plaintiff would probably have been in a position to establish his claim; but in view of the fact that the lease was registered and that payment of the rent claimed has been made in accordance with it *bonâ fide* before the date of the plaintiff's purchase, we are unable to dissent from the decision of the learned District Judge. The payment of rent before it becomes due is not ordinarily a fulfilment of the obligation imposed by a covenant to pay rent, but is in fact an advance to the lessor with an agreement on his part that when the rent becomes due such advance will be treated as a fulfilment of the obligation to pay the rent—see *De Nicholls* v. *Saunders* (1). We must hold, in view of the facts in this case, that the rent sought to be recovered in this suit was satisfied pursuant to the provisions of the lease by the advance previously made. The plaintiff appellant cannot complain, inasmuch as he did not take the precaution of making inquiry as to whether or not any money had been paid in advance as provided for by the document. We therefore dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.
1907
October 29,
December 5.

SURAJMANI AND OTHERS (DEFENDANTS) *v.* RABI NATH OJHA AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Gift—Construction of deed of gift—"Malik"—Gift to widow as "malik wa khud ikhtiyar"—"Absolute ownership"—Heritable and alienable estate—No distinction between male and female donee.

A Hindu executed a deed of gift of immovable property, to take effect after his death, to each of his two wives and his daughter-in-law, "as owners (maliks) with proprietary powers." One of his widows on coming into possession of her share made a will disposing of it in favour of her brother. In a suit by the next heirs of the donor questioning her power of alienation

Held that in the true construction of the deed the widow took a heritable and transferable estate in the property. The use of the word "malik" implies "absolute ownership" unless there is anything in the context or

Present :—Lord ROBERTSON, Lord COLLINS, and Sir ARTHUR WILSON.

(1) (1870) L. R., 5 C. P., 589.

surrounding circumstances to qualify such meaning: and it was not so qualified by the fact that the donee was a widow. In this case the context rather strengthened the presumption that the word was intended to bear its proper technical meaning.

Lalit Mohun Singh Roy v. *Chukkun Lal Roy* (1) and *Kollany Kooer* v. *Luchmee Pershad* (2) followed.

APPEAL from a judgment and decree (2nd November 1903) of the High Court at Allahabad which affirmed a judgment and decree (11th March 1901) of the Court of the Subordinate Judge of Gorakhpur.

The main question raised on this appeal was whether the first appellant Surajmani had or had not the power of alienation in regard to the property in suit. The following pedigree explains the suit and the relationship of the parties thereto.

ISHWAR NATH OJHA.

First wife, Musammat Dhan Mati.	Second wife, Musammat Surajmani, first defendant.
Deo Nath Ojha=Musammat Saraswati, died before suit.	
Pirthumani.	
Rabi Nath Ojha, plaintiff.	Ganga Dhar Ojha, plaintiff.

The property in suit belonged to Ishwar Nath Ojha, who died about 1882 leaving him surviving all the other persons named in the pedigree except his son, Deo Nath Ojha. On 2nd April 1877 he executed a will, of which the material portion is set out in their Lordships' judgment, leaving portions of the property to Dhan Mati, Surajmani, and Saraswati respectively. On Ishwar Nath Ojha's death Surajmani took possession of the property devised to her, and on 19th March 1896 she made a will by which she purported to dispose of it in favour of her brother Ram Narain Ojha, who died prior to the institution of the present suit, which was brought on 4th September 1900 by Rabi Nath Ojha and Ganga Dhar Ojha for a declaration that Surajmani was incompetent to execute the will of 19th March 1896 or to alienate the property.

The defendants were Surajmani and the heirs of Ram Narain Ojha, who denied the right of the plaintiffs to sue as they were not the next heirs of Ishwar Nath Ojha and Surajmani, and

(1) (1897) L. R. 24 I. A., 76: I. L. R., 24 Calc., 834.

(2) (1875) 24 W. R., 395.

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pleaded that the will of Ishwar Nath Ojha conferred on Surajmani a heritable and alienable estate which she was competent to transfer by her will.

The Subordinate Judge held that the will of Ishwar Nath Ojha only gave Surajmani the limited estate for life of a Hindu widow, and did not empower her to alienate the property. He therefore decreed the suit and made the declaration prayed for.

On appeal the High Court (KNOX and AIKMAN, JJ.) affirmed the decree of the Subordinate Judge.

The case before the High Court is reported in I. L. R., 25 All., 351.

On this appeal—

DeGruyther for the appellants contended that on the proper construction of the will of Ishwar Nath Ojha the appellant Surajmani acquired a heritable and transferable interest in the property devised to her. The word "malik" of itself implied absolute ownership, and therefore carried the power of alienation with it, unless there was anything in the will or deed of gift to qualify such meaning. Reference was made to *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1); *Rajnarain Bhadury* v. *Aushutosh Chuckerbutty* (2) and the same case on appeal *Rajnarain Bhadury* v. *Katyani Dabee* (3); *Padam Lal* v. *Tek Singh* (4); Mayne's Hindu Law, 6th ed., page 865, section 665; 7th ed., page 890, and *Jiwan Panda* v. *Sona* (5). Here there were no words to qualify the nature of the gift.

Ross for the respondents contended that the word "malik" meant "owner," and not necessarily "absolute owner"; the real meaning of the phrase in the will was "owner with independent authority." Reference was made to *Mathura Das* v. *Bhikhan Lal* (6); *Janki* v. *Bhairon* (7); Stoke's Hindu Law Books, Dayabhaga, page 241, chapter I, sections 1, 18, 19 and 23; Id. Mitakshara, Part II, page 373, chapter I, section 1, placitum 20. Mayne's Hindu Law, 7th ed., page 527, section 397; *Harilal Pranlal* v. *Bai Rewa* (8), and *Mahomed Shamsool Hooda* v. *Shewakram* (9). There must in the case of a widow be express words

(1) (1897) L. R., 24 I. A. 76; I. L. R., 24 Calc. 834.
(2) (1899) I. L. R., 27 Calc., 44.
(3) (1900) I. L. R., 27 Calc., 649.
(4) (1906) I. L. R., 29 All., 217.
(5) (1869) 1 N.-W. P., 6.
(6) (1896) I. L. R., 19 All., 16.
(7) (1896) I. L. R., 19 All., 133 (135).
(8) (1895) I. L. R., 21 Bom., 376.
(9) (1874) L. R., 2 I. A., 7 (15); 14 B. L. R., 226 (231,232).

in the will or deed of gift which give powers beyond what are given by the word "malik." In the case of *Rajnarain Bhadury* v. *Aushutosh Chuckerbutty* (1) and the same case on appeal (2) both the original and appellate courts held that there was something more than the mere gift of ownership, and that the additional words gave an absolute estate with power of alienation, and on that ground they distinguished the case from the Bombay case above cited. The Courts below were right, it was therefore submitted, in holding that the appellant Surajmani took only a limited estate in the property.

DeGruyther replied referring to *Mahomed Shamsool Hooda* v. *Shewakram* (3); and *Kollany Kooer* v. *Luchmee Pershad* (4).

1907, *December* 5th:—The judgment of their Lordships was delivered by LORD COLLINS:—

This is an appeal from the High Court at Allahabad affirming the decision of the Subordinate Judge of Gorakhpur. The question is whether the first appellant, Musammat Surajmani, acquired a right to alienate the property now in suit under a deed of gift or testamentary instrument of her late husband, Ishwar Nath Ojha. The material part of the document is as follows:—

"I now of my own free will and accord while in a sound state of mind and in enjoyment of my senses make a gift of the entire village Dwarkapur Nankar in tappa Asnari and half of the village Telpurwa in tappa Pachhar to Musammat Dhanmati, my first wife, the entire village Doharia Khurd in tappa Banjarha and half of mauza Telpurwa aforesaid to Musammat Surajmani, my second wife, and half of mauza Jamla Jot, *i.e.*, an eight anna share in it, in tappa Barikpar to Musammat Sarsuti, my daughter-in-law, out of the aforesaid property without consideration on the conditions that during my lifetime shall remain in possession of the said property as heretofore, and my name shall remain recorded in respect of it in the public records and the Musammats aforesaid shall be maintained by me, that after my death they shall under this document get their names recorded in the public records in respect of their respective properties given to them and remain in possession as owners with proprietary powers; and that if perchance I have a male issue hereafter, this deed of gift shall be considered null and void as against him."

The words translated "as owners with proprietary powers" are in the original "malik wa khud ikhtiyar." The appellants

(1) (1899) I. L. R., 27 Calc., 44.
(2) (1900) I. L. R., 27 Calc., 649.
(3) (1874) L. R., 2 I. A., 7 (14); 14 B. L. R., 226 (231).
(4) (1875) 24 W. R., 395.

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contend that these words are amply sufficient to confer an alienable estate. The respondents, on the other hand, contended, and the Courts below have held, that under these words the lady took no more than the ordinary estate of a Hindu widow, which is inalienable except in special conditions which are not alleged to exist in this case.

After the death of her husband Musammat Surajmani entered into possession of the property given to her and has purported to dispose of it by will in favour of her brother Ram Narain Ojha. The present suit is brought by the plaintiffs (respondents) as heirs of Ishwar Nath and of Surajmani for a declaration that the latter was incompetent to execute the said will, and it is against the decision in their favour that this appeal is brought. The effect of the word "malik" in testamentary gifts has been often discussed in cases decided in the different Courts in India, where there has been apparently some fluctuation of opinion. For instance, since this case was decided in the High Court of Allahabad, the same Court, differently constituted, has refused to follow it and expressed the opinion that the words in question passed the absolute estate, *Padam Lal* v. *Tek Singh* (1).

In the present case the Subordinate Judge seemed to recognize that the trend of the decisions of the Calcutta Courts was opposed to his view, but felt bound to follow what he thought was the result of the Allahabad cases, which were binding upon him.

In *Kollany Kooer* v. *Luchmee Pershad* (2) decided in 1875, Mitter J., in dealing with the case of a will where the donees were the widow and daughter of the testator, and the word "malik" was used, thus expresses himself (at p. 396) :—

"As far as the words go, I think it is plain that the testator intended to make an absolute gift of his property in favour of his widow and daughter. He says that after his death they shall be (maliks) proprietors and his entire estate shall devolve upon them. In *Jotendro Mohun Tagore* v. *Ganendro Mohun Tagore* (3) the Judicial Committee say : —'If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindoo Law (as under the present state of the law it does by will in England) an estate of inheritance.' In the testamentary instrument under our consideration, from the context it does not appear that the testator intended a limited gift in favour of Bani

(1) (1906) I. L. R., 29 All., 217, at pp. 221, 222. (2) (1875) 24 W. R., 395.
(3) (1872) L. R. I. A., Sup. Vol., 47 (66) : 9 B. L. R., 377 (396) : 18 W. R., 359, at p. 365.

Kooer and Uma Kooer. Therefore adopting the rule of construction above quoted we must hold that the gift in question was an absolute gift unless it can be shewn that by the Hindoo law gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to the 'widow's estate' under the law of inheritance. I am not aware of any such provision in the Hindoo law nor have we been referred to any authority in support of it."

The question as to the effect of the word "malik" came before this Board in 1897 in the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1). The donee in that case was a man, but the principles of interpretation laid down were of general application. Referring to the donee the testator said:—

"If no children are born to me . . . or if at the time of my death they are not alive, then . . . my nephew . . . becoming on my death my sthalabhishikta and becoming owner (malik) of all my estate and properties, &c., shall, remaining my sthalabhishikta, obtaining the management of the Iswarshebas . . . enjoy with son, grandson, and so on in succession the proceeds of my estate . . . The minor, on reaching majority, shall exercise ownership (malikatwa) over all the properties."

In delivering the judgment Lord Davey, at p. 88 of L. R., 24 I. A., says:

"It was not disputed . . . that the son of the testator, if there had been one, or his daughter, if there had been one, would have taken an absolute heritable and alienable estate . . . Nor was it disputed that the words of gift to the appellant were such as to confer on him also an heritable and alienable estate. The words 'become owner (malik) of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words 'enjoy with son, grandson, and so on in succession' which latter words are frequently used in Hindoo wills and have acquired the force of technical words conveying an heritable and alienable estate."

This case seems to adopt and apply the same view of the word "malik" as was taken in the Calcutta case of *Kollany Kooer* v. *Luchmee Pershad* (2) above cited, with the result that in order to cut down the full proprietary rights that the word imports something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding circumstances or is relied upon by the respondents, but the fact that the donee is a woman and a widow, which was expressly decided in the last mentioned case not to suffice. But while there is nothing in the context or surrounding facts to displace the

(1) (1897) L. R., 24 I. A., 76 : I. L. R., 24 Calc., 834.

(2) (1875) 24 W. R., 395.

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presumption of absolute ownership implied in the word "malik," the context does seem to strengthen the presumption that the intention was that "malik" should bear its proper technical meaning. It is to be observed that the gift to the testator's daughter-in-law, Musammat Saraswati, is made in precisely the same terms. The learned counsel for the respondents was unable to adduce any reason for holding that in her case the gift should be cut down to anything less than a full proprietary right, and, if this be admitted, the respondents have to contend for two contradictory interpretations of the same phrase.

In the result, therefore, with the greatest respect for the learned Judges in the Courts below, their Lordships are unable to agree with their decision. Their Lordships will humbly advise His Majesty that the appeal be allowed and the decrees of both Courts below discharged, and instead thereof the suit dismissed with costs in both Courts. The respondents will pay to the appellants the costs of this appeal.

Appeal allowed.

Solicitors for the appellants—*Pyke, Parrott & Co.*

Solicitors for the respondents—*Osborn Jenkyn & Son.*

J. V. W.

APPELLATE CIVIL.

1907
July 17.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ASHIQ HUSAIN AND OTHERS (DEFENDANTS) *v.* ASGHARI BEGAM AND ANOTHER (PLAINTIFFS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 32—*Exproprietary holding—Suit for possession of half of an exproprietary holding.*

The plaintiffs sued to recover possession of one half of an exproprietary holding, and added a prayer for "any other relief which might in the opinion of the Court be deemed just and proper." *Held* that the suit for possession of half of the exproprietary holding would not lie, being opposed to section 32 of the Agra Tenancy Act, 1901, but that, on the finding that the plaintiffs' share in the holding was one half, the plaintiffs were entitled to a decree declaring their right to a half share.

THIS was a suit brought by Musammat Asghari Begam and Musammat Akbari Begam, the daughters of one Masum Ali, for

* Second Appeal No. 195 of 1905 from a decree of Alopi Prasad, Additional Subordinate Judge of Moradabad, dated the 23rd of December 1904, modifying a decree of Mohan Lal Hukku, Munsif of Havali, Moradabad, dated the 29th of June 1904.